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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6 **RENO, NEVADA**

7 CRAIG TOBELER,) 3:09-cv-00309-ECR-RAM
8))
9 Plaintiff,))
10))
vs.) Order
11 MICHAEL J. ASTRUE, Commissioner))
of Social Security,))
12 Defendant.))
13))
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15 On April 12, 2011, the Court entered an Order (#29) remanding
16 the action for consideration of lay witness testimony. On May 19,
17 2011, Plaintiff filed a Motion for Attorney's Fees (#32) pursuant to
18 the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412,
19 requesting EAJA fees in the amount of \$8,033.52.

20 On July 5, 2011, Defendant opposed (#35) the request for EAJA
21 fees on the basis that the government's position was substantially
22 justified. In the event that fees are granted, Defendant argues
23 that Plaintiff's requested fees are excessive. A party is entitled
24 to EAJA fees unless the court finds that the position of the United
25 States was substantially justified or that special circumstances
26 make an award unjust. 28 U.S.C. § 2412(d)(1).

27 In this case, we remanded the action because the ALJ failed to
28 address lay witness testimony that corroborated Plaintiff's statements,

1 which the ALJ found to be uncredible. Defendant argues that the
2 Plaintiff's wife's lay witness report concerned a period after the
3 relevant disability period in this case. Plaintiff's employer's lay
4 witness report did not give specific times and dates, and therefore may
5 also be irrelevant to the Administrative Law Judge's ("ALJ") ultimate
6 conclusion on remand. The case was remanded because of the heightened
7 harmless error standard when lay witness testimony is not addressed by the
8 ALJ, but under the circumstances, we cannot find that the government's
9 position was not substantially justified. While Plaintiff prevailed on
10 the issue of lay witness testimony, the remainder of the ALJ's conclusions
11 were affirmed.

12 **IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's Motion for Fees
13 (#32) is **DENIED**.

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15 DATED: April 16, 2012.

16 
17 UNITED STATES DISTRICT JUDGE

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